Filed 12/28/12 Adams v. Griffin CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHARLES D. ADAMS, Cross-complainant and Respondent, v. MORRIS F. GRIFFIN, Cross-defendant and Appellant.	B236839 (Los Angeles County Super. Ct. No. BC420529)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Reversed.

Morris F. Griffin, in pro. per., for Cross-defendant and Appellant.

Charles D. Adams, in pro. per.; Wesierski & Zurek, Frank J. D'Oro and Paul J. Lipman for Cross-complainant and Respondent.

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Morris F. Griffin appeals from a default judgment entered against him in the amount of $17,724.52 in favor of Charles D. Adams on a cross-complaint for slander and defamation. Griffin argues that the trial court erred in entering the default judgment and in denying his motion to set aside the default judgment. We reverse.

BACKGROUND

The pleadings in this matter that were filed by the parties in propria persona are difficult to understand. In 2006, according to Adams, he was elected as a candidate of a bargaining table for his union; Griffin was not elected because he had failed to fill out a candidate form. Subsequently, Griffin allegedly threatened and stalked Adams, defaced Adams's photos posted on "public bulletins," and spread false rumors about Adams, including that he was homosexual.

On August 26, 2009, Griffin filed against Adams a complaint for violation of civil rights, defamation, intentional infliction of emotional distress and causes of action involving employment and automobile violations, which is not contained in the record.

On November 3, 2009, Adams filed a cross-complaint against Griffin for intentional infliction of emotional distress, defamation, and slander.

On November 19, 2009, Griffin filed an answer to Adams's cross-complaint, mistitled, "Intentional infliction of emotional distress; harassment; defamation; demoralization; slander," controverting the causes of action of Adams's cross-complaint.

On December 21, 2009, upon Adams's request for entry of default, default was entered against Griffin on Adams's cross-complaint. A declaration of mailing indicated that a copy of the request for entry of default was mailed to Griffin on December 21, 2009.

On July 8, 2010, Griffin filed a motion to set aside the default based on Adams's failure to serve him with the summons and complaint.

On July 29, 2010, the trial court denied Griffin's motion to set aside the default judgment.

Griffin apparently filed a motion for reconsideration, which is not contained in the appellate record, because on September 13, 2010, the court denied Griffin's motion for

reconsideration on the grounds that "Griffin states that the error was made due to the lack of pro per knowledge of the importance of document. However, Griffin does not state why this was not offered earlier. Moreover, Griffin still has not attached a proposed responsive pleading to the cross-complaint as required by CCP § 473(b). Griffin's motion for reconsideration is DENIED." As noted, Griffin had filed a responsive pleading to the cross-complaint, albeit mistitled.

Sometime afterward, Griffin retained an attorney, who filed a motion to vacate the default judgment.

On December 16, 2010, the court denied the motion to vacate stating, "On July 29, 2010, this Court denied . . . Griffin's Motion To Set Aside Default and Default Judgment. On September 13, 2010, this Court denied . . . Griffin's Motion For Reconsideration On Motion To Set Aside Default and Default Judgment. In that Motion for Reconsideration, Griffin raised the argument he raises here—that the Answer was miscaptioned and not recognized by the Clerk. . . . Griffin now seeks a third bite at the apple without meeting the requirements of CCP § 1008 for what is in effect a motion for reconsideration of this Court's denial of reconsideration of the denial of its motion to set aside default. Fundamentally, Griffin fails to show new or different facts, circumstances or law as required under CCP § 1008 for reconsideration of the Court's prior denial of an application."

On June 10, 2011, a prove-up hearing was conducted on Adams's cross-complaint. A default judgment was entered in favor of Adams and against Griffin on June 10, 2011, for $17,724.52. On September 14, 2010, Griffin filed a first amended complaint, to which the trial court ultimately granted Adams's motion for judgment on the pleadings on December 16, 2011.

On October 7, 2011, Griffin filed a notice of appeal from "Judgment after court trial [¶] Default judgment [¶] Judgment after an order granting a summary judgment motion [¶] Judgment of dismissal" under various sections of the Code of Civil Procedure.

This appeal pertains to the default judgment entered June 10, 2011, on Adams's cross-complaint and the denial of Griffin's motion to set aside the default judgment. It does not include the ruling granting Adams's motion for judgment on the pleadings on Griffin's first amended complaint made after Griffin's notice of appeal, as that ruling was not addressed in Griffin's briefs.

DISCUSSION

A. Standard of review

"'A default judgment is reviewable on appeal the same as any other civil judgment. The fact that defendant defaulted in the trial court does not bar its right to appeal the judgment entered. [Citation.]' [Citation.]" (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1153–1154.) "Generally on such an appeal attack is confined to jurisdictional matters and fundamental pleading defects." (*City Bank of San Diego v. Ramage* (1968) 266 Cal.App.2d 570, 582.)

B. The trial court abused its discretion in failing to grant Griffin's motion to vacate the entry of default

Griffin contends that he filed an answer to Adams's cross-complaint and the trial court abused its discretion in failing to grant Griffin's motion to vacate the entry of default. We agree.

If a defendant does not file one of certain enumerated pleadings to a complaint, the clerk, upon written application of the plaintiff, shall enter the default of the defendant. (Code Civ. Proc., § 585, subd. (a).)[1] The clerk's entry of default is a purely ministerial duty. (*Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 143.)

Here, after Griffin filed his responsive pleading to Adams's cross-complaint and upon Adams's request, the clerk entered a default.

Section 473, subdivision (b) states that a court "may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence,

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[1] Statutory references are to the Code of Civil Procedure.

surprise, or excusable neglect." A motion to vacate a default and set aside judgment is addressed to the sound discretion of trial court. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) "'Because the law favors disposing of cases on their merits, "any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]."'" (*Hearn v. Howard*, at p. 1200.)

Griffin filed motions to vacate the default, all of which the trial court denied. We determine that the court abused its discretion in denying his motion. A cursory glance at the responsive pleading would have revealed that Griffin had mistakenly labeled his answer as "Intentional infliction of emotional distress; harassment; defamation; demoralization; slander," as noted in Griffin's subsequent motions for reconsideration. Thus, an answer was on file.

"Where the defendant is not in default because an answer is on file [citation], or because the original answer is sufficient to controvert a complaint amended in some minor aspect [citation], cases conflict as to the effect of a default judgment. One line of cases holds that the judgment is not void, but merely error to be corrected on appeal or by motion for relief under C.C.P. 473. [Citations.] [¶] Another line of cases holds that the judgment is void and is subject to attack at any time. [Citations.]" (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 182, p. 622.) Here, even if the default judgment is not void, the error can be corrected by Griffith's timely appeal.

Accordingly, we shall correct the matter on appeal and reverse the default judgment.

DISPOSITION

The judgment is reversed. Each party to bear his own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.